IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 498 OF 1989

Shri Vasantrao Ramchandra Patil ... Appellant

V/s

Shri Maruti Govind Patil ... Respondent

Ms. Namrata Waghole holding for T.S. Ingale for the appellant.

Shri S.A. Rajeshirke holding for Deepak More for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 14TH OCT., 2004.

P.C.:

1. This is an appeal preferred by the unsuccessful plaintiff against the judgment and order passed by the Addl. District Judge, Sangli, dated 21.1.1989 allowing the appeal of the defendant and dismissing the suit of the plaintiff which came to be partly decreed by the Civil Judge, Sr.Divn., Sangli, on 31.8.1981.

2. Heard learned counsel for both sides.

3. The plaintiff filed the suit for temporary and mandatory injunction as well as in the alternative for

possession of the suit property alleging that defendant had encroached upon his part of the property and erected a shed thereon. The defendant denied the said allegation on the ground that documentary evidence was sufficient to show that the right of way was given as per the agreement between the parties and, therefore, there was no question of any encroachment over the plaintiff's property. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff was entitled for temporary injunction and, therefore, decreed the suit to that extent denying the mandatory relief to the plaintiff.

The appeal was preferred in the District Court. The Addl. District Judge came to the conclusion that the plaintiff had failed to prove any encroachment on the property and as such the appeal came to be allowed and suit was dismissed. Hence the second appeal.

4. At the outset, it may be noted that the substantial question raised at the time of admission of the appeal is to the effect that, whether the plaintiff had proved right of way as pleaded and its continuance as alleged. In my view, the issue in respect of right of way cannot be the substantial question of law in view of the test

of appeal as this is the pure question of fact duly appreciated by both the Courts below and learned appellate Court Judge has come to the conclusion that when the right of way was an admitted position by virtue of agreement of the year 1931 between the parties, there was no proof of any encroachment by the defendant on the said suit way and, as such, the appeal came to be dismissed. It was also observed and is seen that except for the impugned document, there is no other evidence on record to show that there is encroachment by the defendant on the suit way in any manner. My attention was invited to the oral evidence of both parties by the learned advocate for the appellant, however, the cross-examination of the plaintiff's evidence is clear enough to show that nothing turns on that aspect and, as such, I hold that the learned lower appellate Court Judge has rightly held that the suit deserves to be dismissed.

5. In the case of **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar, reported 1999 SCC 2213,** the Apex Court has observed that in a case wherefrom given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not

permissible. In the present case before us, the evidence on record is seen to be properly appreciated by the lower appellate Court and, therefore, I hold that no interference is required in the findings recorded by the lower Courts.

In the result, the appeal stands dismissed in limine with no order as to costs.

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